

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM STONER,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

Case No. C14-1293-RSM-BAT

**REPORT AND
RECOMMENDATION**

William Stoner appeals the ALJ's decision finding him not disabled. He contends the ALJ failed to account for limitations assessed by reviewing medical consultants, Alex Fisher, Ph.D., and Eugene Kester, M.D., and that the Court should therefore remand the matter for further administrative proceedings. Dkt. 12 at 1. The Court agrees, and for the reasons below, recommends the Commissioner's final decision be **REVERSED** and the matter be **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

THE ALJ'S DECISION

The ALJ found, at steps one through three that Mr. Stoner last worked in July 2011; that degenerative disc disease, chronic obstructive pulmonary disease, hepatitis C, hemochromatosis, bipolar disorder, general anxiety disorder, and panic disorder with agoraphobia were severe

1 impairments; and that these impairments did not meet the requirements of the Listings.¹ Tr. 19.
2 The ALJ found that with these impairments, Mr. Stoner retained the residual functional capacity
3 (“RFC”) to perform light work with the following limitations: he had multiple postural and
4 exposure restrictions; he could perform simple jobs that could be learned in 30 days or less with
5 simple work-related decisions and few, if any, workplace changes; and he could have occasional
6 and superficial interaction with the public. Tr. 21-2. Based on this RFC, the ALJ found at step
7 four that Mr. Stoner was not disabled because he could perform past work as a power
8 screwdriver operator or construction worker.² Tr. 28. The ALJ further found Mr. Stoner not
9 disabled at step five based on the Vocational Expert’s (VE) testimony that there were other jobs
10 Mr. Stoner could perform. Tr. 29. As the Appeals Council denied Mr. Stoner’s request for
11 review, the ALJ’s decision is the Commissioner’s final decision. Tr. 1.³

12 DISCUSSION

13 Mr. Stoner raises only one issue: that the ALJ harmfully erred by failing to account for all
14 limitations assessed by reviewing agency medical consultants, Alex Fisher, Ph.D., and Eugene
15 Kester, M.D., as to his social functioning. Dkt. 12 at 1. The ALJ accommodated some social
16 limitations in his RFC determination, restricting Mr. Stoner to occasional and superficial
17 interaction with the public. Tr. 22. Mr. Stoner argues the ALJ erred by failing to include
18 limitations pertaining to interaction with co-workers. Dkt. 12 at 4. He bases this contention on
19 the opinions of Alex Fisher, Ph.D. and Eugene Kester, M.D. There is no dispute that both
20 doctors stated Mr. Stoner was able to handle a small group of co-worker interactions and will

21 ¹ 20 C.F.R. Part 404, Subpart P. Appendix 1.

22 ² Mr. Stoner contends that the ALJ erroneously determined that he performed his prior
construction work at a light level. However, because the ALJ cited additional light jobs at steps
four and five, Mr. Stoner concedes that this issue is not dispositive. Tr. 3, fn. 1.

23 ³ As the other portions of the procedural history are not at issue, or necessary to resolve the case,
they are not discussed.

1 become more comfortable as becomes more accustom to them, and that was best with minimal
2 public interactions. Tr. 158, 177. At issue is whether the statement constitutes a limitation that
3 the ALJ should have accounted for in her RFC determination, as Mr. Stoner claims, or simply “a
4 mere observation” that “does not prescribe any specific limitations” as the Commissioner
5 claims. Dkt. 18, at 4, 5.

6 The record shows, and the parties agree, that Drs. Fisher and Kester completed Mental
7 Residual Functional Capacity Assessments (“MRFC”). Dkt.18 at 3; Dkt. 19 at 3. There are
8 several iterations of the MRFC. One version contains three major sections: “Summary
9 Conclusions,” “Remarks,” and “Functional Capacity Assessment.” *See* Program Operations
10 Manual System (POMS) DI 24510.060(B), *available at*
11 <https://secure.ssa.gov/poms.nsf/lnx/0424510060>. In this version, Section I sets forth “Summary
12 Conclusions,” and contains “check box” ratings for the degree of limitation of mental activities
13 needed for sustaining work on a consistent basis. This section is considered “merely a worksheet
14 to aid in deciding the presence and degree of functional limitations and the adequacy of
15 documentation and does not constitute the RFC assessment.” POMS DI 24510.060(B)(2)(a).
16 The actual RFC assessment which an ALJ should consider is contained the narrative section that
17 is written by the consultant in Section III, the “Functional Capacity Assessment.” POMS DI
18 24510.060(B)(4)(a). *See, Coffman v. Colvin*, No. C12-5812-JLR-BAT, 2013 WL 355422, at *2-
19 *3 (W.D. Wash. July 10, 2013).

20 Drs. Fisher and Kester completed MRFC’s with a different format. The format they
21 utilized has four categories of mental limitations—understanding and memory, sustained
22 concentration and persistence, social interaction, and adaptation. Tr. 157-8. Within each
23 category, there are questions pertaining to limitations regarding various mental activities, such as

1 the ability to understand and remember detailed instructions, ability to make-simple work related
2 decisions, and the ability to ask simple questions or request assistance. Tr. 157-8. The form
3 explains that the questions are designed to assist in determining the claimant's ability to perform
4 sustained work activity and are not the assessed RFC. *See e.g.* Tr. 157. Instead, the MRFC form
5 that the doctors used states "the actual mental residual functional capacity assessment is recorded
6 in the narrative discussion(s), which describe how the evidence supports each conclusion. This
7 discussion(s) is documented in the explanatory text boxes following each category of limitation."
8 Tr. 157.

9 Thus the new form essentially sets forth mini-RFC narrative assessments for each of the
10 four functional domains of understanding and memory, concentration and persistence, social
11 interactions, and adaptation. These mini-RFC narratives are found after the questionnaire
12 portion of each category and are indicated by the directive that the doctor "[e]xplain in narrative
13 form . . . the limitations indicated above." Tr. 157-8.

14 Drs. Fisher and Kester responded to the directive "[e]xplain in narrative form the social
15 interaction limitations indicated above," with the statement that Mr. Stoner is able to handle a
16 small group of co-workers and does best with minimal public interactions. Tr. 158. The doctors
17 specifically included the small group co-worker issue in the portion of the form that is designated
18 for an RFC assessment, and which the form describes as the *limitations* to social interactions.
19 Had the reviewing consultants intended the statement to be a mere observation or
20 recommendation, as the Commissioner claims, the form provided an outlet other than the RFC
21 section. The MRFC form provides that "Any other assessment information deemed appropriate
22 can be recorded in the MRFC- Additional Explanation text box." Tr. 157.

23 Thus, the Acting Commissioner's argument that the statement is a mere recommendation

1 or observation is not supported by the record and is unpersuasive. If anything, by placing the
2 small group co-worker issue in the narrative portion regarding Mr. Stoner's social interaction
3 limitations, the doctors were indicting their intent to include the small group co-worker limitation
4 in the RFC.

5 The medical record also supports the social interaction limitation to a small group of co-
6 workers. Drs. Fisher and Kester both opined Mr. Stoner was moderately limited in his ability to
7 work in coordination or proximity to others. Tr. 157-8, 175-7. Examining psychologist Ellen
8 Walker Lind, Ph.D. noted that Mr. Stoner would have difficulties with workplace social
9 interactions. "He also has anger-management issues that would interfere with work
10 relationships." Tr. 383. She opined he would need a work environment with limited personal
11 interaction. Tr. 383. Another examining provider, Anselm Parlatore, M.D., opined Mr. Stoner
12 would have marked limitations in his ability to communicate and perform effectively in a work
13 setting, even with limited public contact. Tr. 335. These specialists both found that Mr. Stoner
14 required limited social interaction beyond limited public contact.

15 In short, the medical evidence of record and the structure of the assessment form
16 persuade the Court that Drs. Fisher and Kester intended to include a limitation to working with a
17 small group of co-workers in Mr. Stoner's mental RFC. "State agency medical and
18 psychological consultants and other program physicians, psychologists, and other medical
19 specialists are highly qualified physicians, psychologists, and other medical specialists who are
20 also experts in Social Security disability evaluation." 20 C.F.R. § 416.927(e)(2)(i). Given this
21 expertise, an ALJ cannot ignore these opinions. Social Security Ruling 96-6p. The ALJ was
22 required to weigh the limitations and accept or provide reasons for rejection. "If the RFC
23 assessment conflicts with an opinion from a medical source, the adjudicator must explain why

1 the opinion was not adopted.” SSR 96-8p.

2 Here, the ALJ omitted a limitation from the mental RFC that was assessed by agency
3 consultants. The ALJ provides no reason for this omission, even though the ALJ noted the
4 limitation in her analysis. “Drs. Fisher and Kester opined that the claimant is moderately limited
5 in his ability to interact appropriately with the public, get along with co-workers and peers
6 without distracting them or exhibiting behavioral extremes . . . The opinions of Drs. Fisher and
7 Kester are consistent with and supported by the evidence of record.” Tr. 27. However, while
8 the ALJ purported to give “great weight” to these opinions, the ALJ committed harmful error by
9 omitting an important functional limitation without comment. Tr. 27.

10 The Acting Commissioner claims that any error is harmless. Dkt. 13 at 6. An error is
11 harmless if it is inconsequential to the determination of non-disability. *Molina v. Astrue*, 674
12 F.3d 1104, 1115 (9th Cir. 2012). “A decision of the ALJ will not be reversed for errors that are
13 harmless.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). The burden to show prejudice
14 is on Mr. Stoner. *See, McLeod v. Astrue*, 640 F.3d 881, 888 (9th Cir. 2011). The Acting
15 Commissioner claims harmless error on the grounds that Mr. Stoner failed to meet his burden by
16 showing an impact on his “substantial rights.” Dkt. 13 at 6.

17 The record belies the Commissioner’s claim. The ALJ omitted, without comment, a
18 limitation included in a medical opinion and intended as part of the mental RFC. Consequently,
19 The ALJ’s RFC determination failed to account for all limitations assessed by the reviewing
20 doctors. 20 C.F.R. § 416.945(a); *Mayes v. Massanari*, 276 F.3d 453, 460 (9th Cir. 2001). This
21 failure undermines the ALJ’s determinations at both steps four and five of the disability analysis.

22 At step four, the ALJ must determine if the claimant is capable of performing his past
23 relevant work. *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). The burden is on Mr.

1 Stoner to prove that he can no longer perform his past work. *Id.* However, the ALJ must make
2 accurate factual findings to support the step four conclusion. *Id.* “This is done by looking at the
3 ‘residual functional capacity and the physical and mental demands’ of the claimant’s past
4 relevant work.” *Id.* at 844-5 (quoting 20 C.F.R. §§ 404.1520(e), 416.920(e)). This includes
5 inquiry into the physical and mental demands of that work. *Id.* at 845. Here, the ALJ did not
6 inquire into the nature of the social interaction required among co-workers in Mr. Stoner’s prior
7 work as a power screwdriver operator or construction worker. Because the RFC failed to
8 account for the small group co-worker limitation assessed by the consulting physician, the ALJ
9 did not consider whether the levels of social interaction with co-workers would cause Mr.
10 Stoner’s prior work to surpass his mental capacity, and harmfully erred at step four.

11 At step five, the burden shifts to the Commissioner to show that Mr. Stoner can perform
12 other work available in significant numbers in the national economy. *Tackett v. Apfel*, 180 F.3d
13 1094, 1100 (9th Cir. 1999). To meet this burden, the ALJ solicited testimony from a vocational
14 expert through hypothetical questions. *Id.* at 1100-1101, Tr. 62-5. The ALJ, however, failed to
15 meet the step five burden because the vocational expert identified other jobs based on an
16 incomplete RFC. “Hypothetical questions posed to the vocational expert must set out *all* the
17 limitations and restrictions of the particular claimant.” *Embrey v. Bowen*, 849 F.2d 418, 422-3
18 (9th Cir. 1988). When the hypothetical is not supported by the record and does not include all
19 the limitations, the testimony of the vocational expert has no evidentiary value. *Id.* The
20 vocational expert did not consider or testify about the impact that a limitation to a small group of
21 co-workers might have on Mr. Stoner’s ability to perform his past relevant work or other jobs
22 available in the economy. Without consideration of the small group limitation, the vocational
23 expert’s testimony did not incorporate all of Mr. Stoner’s restrictions when identifying other

1 work possibilities. The testimony has no evidentiary value and cannot support the ALJ's
 2 decision that Mr. Stoner can perform his past relevant work and other jobs in the economy. *Id.* at
 3 423. Accordingly, because of the errors at steps four and five, the ALJ's ultimate conclusion of
 4 non-disability is fatally flawed. The error is not harmless and requires reversal.

5 **CONCLUSION**

6 For the foregoing reasons, the Court recommends that the Commissioner's final decision
 7 be **REVERSED** and the case be **REMANDED** for further administrative proceedings under
 8 sentence four of 42 U.S.C. § 405(g). On remand, the ALJ should include the small group
 9 limitation in the RFC, develop the record as necessary, proceed to steps four and five, and obtain
 10 new testimony as needed from a vocational expert that reflects this revised RFC.

11 A proposed order accompanies this Report and Recommendation. Any objection to this
 12 Report and Recommendation must be filed and served no later than **April 7, 2015**. If no
 13 objections are filed, the Clerk shall note the matter for April 10, 2015 as ready for the Court's
 14 consideration. If objections are filed, any response is due within 14 days after being served with
 15 the objections. A party filing an objection must note the matter for the Court's consideration 14
 16 days from the date the objection is filed and served. Objections and responses shall not exceed
 17 ten pages. The failure to timely object may affect the right to appeal.

18 DATED this 24th day of March, 2015.

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 21 BRIAN A. TSUCHIDA
 22 United States Magistrate Judge
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